Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

MARIE EVANS, p.p.a., MURIEL EVANS,

Petitioner,

vs.

TERRACE AVERY, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appeals Court erred in holding that the appropriate standard for determining whether a substantive due process violation occurred in a high speed police pursuit is whether the officers' conduct "shocks the conscience," rather than whether the officers acted with reckless disregard for the petitioner's liberty interests.

2. Whether the petitioner adduced sufficient proof at the trial of this action to warrant submitting to the jury under an appropriate standard the question of whether respondents had deprived her of her liberty in violation of her substantive due process rights.

PARTIES TO THE PROCEEDING

Petitioner, Marie Evans, suing by and through her mother and next friend, Muriel Evans, is a resident of Dorchester, Massachusetts. She was the plaintiff in the district court proceedings and the appellant before the Court of Appeals for the First Circuit.

Muriel Evans and Billie Evans are the parents of Marie Evans. They were plaintiffs in a related state law claim in the district court and appellees before the Court of Appeals for the First Circuit, on the appeal taken by the City of Boston from a judgment in their favor in the district court. They are not parties to this action under 42 U.S.C. § 1983.

Respondents, Terrace Avery and John J. Greene, are police officers of the City of Boston Police Department. They were defendants in the district court proceedings and appellees before the Court of Appeals for the First Circuit.

Respondent, City of Boston, is an incorporated municipality in the Commonwealth of Massachusetts. It was a defendant in the district court and an appellee before the Court of Appeals for the First Circuit.

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PETITION FOR CERTIORARI

Marie Evans, by her mother and next friend, Muriel Evans, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

On November 20, 1996, the United States Court of Appeals for the First Circuit (the "First Circuit") issued its opinion, affirming the judgment of the United States District Court for the District of Massachusetts. (App. 3a). The First Circuit opinion is reported as *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996). The trial court granted judgment as a matter of law in favor of the respondents in open court on August 7, 1995. The court's subsequent written decision of September 5, 1995, is reported as *Evans v. Avery*, 897 F. Supp. 21 (D. Mass. 1995). (App. 22a).

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the First Circuit and its judgment of November 20, 1996. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

> abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings

This action was filed originally in the Massachusetts Superior Court for Suffolk County, making constitutional claims against the individual defendants and the City of Boston under 42 U.S.C. § 1983 and negligence claims against the City of Boston under the state tort claims act, Massachusetts General Laws, Chapter 258, for injuries suffered during a high speed

police pursuit which took place on August 12, 1992. The defendants removed the action to the United States District Court for the District of Massachusetts on February 1, 1994. Federal jurisdiction was conferred by 28 U.S.C. §§ 1331, 1343(3) and (4).

Prior to trial, on March 14, 1995, the district court, Young, J., granted summary judgment in favor of the City of Boston on petitioner's § 1983 claims. (App. 28a). A jury trial on the remaining counts began on July 31, 1995. At the conclusion of the evidence, the court, Collings, M.J., granted judgment as a matter of law on the motion of defendants Greene and Avery on petitioner's remaining § 1983 claims. Petitioner and each of her parents obtained a jury verdict in their favor on the negligence claims against the City of Boston, in the amount of One Hundred Thousand ($100,000) Dollars per plaintiff, the statutory maximum.

Judgment was entered in the district court on September 5, 1995. The Court of Appeals for the First Circuit affirmed the judgment in all respects on November 20, 1996.

B. Statement of Facts

Two days before her tenth birthday, on August 12, 1992, Marie Evans was run down by an Oldsmobile automobile in an inner-city neighborhood in Boston, Massachusetts, two blocks from her home.[1] At the time, Boston police officers, John J. Greene and Terrace Avery, were chasing the Oldsmobile into and through the densely populated intersection known as Codman Square at speeds up to 50 miles per hour. This high speed pursuit took place at approximately 6:00 p.m. on a warm

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1. Because respondents obtained a judgment as a matter of law, the facts have been stated in the light most favorable to the petitioner.

summer weekday evening, and there were many pedestrians, bicyclists, and vehicles in the square. The occupants of the suspect vehicle, who were unknown to the police, were suspected at worst of being in possession of $180 worth of cocaine.

Marie was thrown up over the hood of the Oldsmobile, rendered unconscious by the impact and remained in a coma for several weeks. She suffered disabling brain injuries from which she will not recover.

The police activity began when the officers, in an unmarked, undercover police vehicle, saw an individual stepping into the street at the intersection of Nixon and Centre Streets. The officers had no information regarding this person. Greene testified that the individual looked at them and their car with some recognition and surprise, went to the driver's side of his vehicle, yelled something in Spanish, threw a paper bag in the window and jumped into the car, where another man was sitting in the passenger seat.

The Oldsmobile drove away at 20-25 miles per hour. Greene decided that he wanted to try to stop it, question the occupants, look in the car and see what he could learn. He made a u-turn and turned on his siren. He also put on his wig-wag lights, which alternately turned on the right and left front headlights. The Oldsmobile did not stop for the officers and accelerated somewhat as it went up Centre Street.

The location where the incident began is a residential neighborhood, with a school on the corner. There are multi-family houses on both sides of Centre as it proceeds from Nixon to Codman Square and six "*Drive Slow – Children*" signs are posted along the street. Parked vehicles along Centre Street at times made it difficult for two cars to pass due to minimal clearance. Numerous children were playing outside on nearby streets.

There was no posted speed limit on Centre Street. Under Massachusetts law, the basic speed limit provides that a vehicle may not be operated "at a rate of speed greater than is reasonable and proper, having regard to traffic and the use of the way and the safety of the public."[2] Mass. Gen. L. ch. 90, § 17. Greene testified at one point that the speed limit on Centre, because it was a "highly residential area," was 15 to 20 miles per hour.

There was limited visibility in every respect entering Codman Square from Centre Street. Codman Square was a five-cornered intersection, where four streets met. There were rapid changes in elevation from the streets which entered Codman Square to the top of a hill in the intersection itself, so that approaching from Centre, cars entering Codman Square from other streets were not visible. To the left, looking toward Washington Street where Marie Evans was struck by the Oldsmobile, vision was blocked by a fence, a large leafy tree, and a monument.

When the officers chased the Oldsmobile into Codman Square, they placed numerous children and other innocent people at risk. Several children and adults were riding bicycles through the square. There were numerous pedestrians in the intersection and the traffic was characterized as "rush hour traffic." A police videotape taken at 7:30 p.m. that same evening depicts heavy traffic traveling through the Square.

The respondent officers had every reason to know of the visibility problems at the intersection and that Codman Square would be crowded with people. Both were very familiar with the intersection as a shopping area and a densely populated

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2. On an unposted street in a thickly settled area, a speed greater than 30 miles per hour would be prima facie evidence of excessive speed. The "speed limit," however, could be lower, depending on conditions. Mass. Gen. L. ch. 90, § 17.

residential area, having either lived or worked as police officers in the neighborhood for many years.

From the officers' own admissions at their depositions, which were introduced at trial, it was evident that they did not consider public safety when they began the chase and pursued the suspects into Codman Square. The officers did not balance the law enforcement objectives they were pursuing against the risks a high speed chase would create in the congested urban area where they found themselves. They gave such matters no thought despite their actual knowledge of the character of the neighborhood around them.

Shortly before trial, the officers manufactured a claim, which contradicted their earlier deposition testimony, that they believed the suspects would stop after ingesting the small quantity of drugs the officers thought they were carrying. Magistrate Judge Collings specifically found that the jury could have disbelieved the officers' testimony that they thought the suspects would stop.

As the Oldsmobile traveled up Centre Street, the officers followed closely behind it. The vehicles traveled somewhere between 30 and 45 miles per hour, according to Greene's own testimony. The police kept on their wig-wag lights and siren. The officers knew that the pursuit would go through Codman Square. While on Centre Street, Greene radioed the dispatcher that they were "chasing a motor vehicle into Codman Square."

The officers claimed no more than that the suspects were "low-level drug dealers," who would carry two or three $40 to $60 bags of drugs in their mouths or in their car at a time, returning to a "stash" to get more as they were sold. The officers testified that on Centre Street they saw the men in the Oldsmobile put their hands toward their mouths as if they were eating

something, and pass a jug of water between them. The officers formed the opinion that they were ingesting cocaine. Greene hypothesized that if the suspects had succeeded in swallowing the small quantity of drugs he thought they had, and they eventually stopped, the purpose of the chase would simply have been to identify the suspects. On this theory, the officers would have generated only a field investigation report and made no arrest.

As the Oldsmobile came to the top of Centre Street, it moved into the left lane, driving on the wrong side of the road, and passed three vehicles stopped at the top of Centre. According to Greene's testimony, the police were two to three car lengths from the corner when the Oldsmobile made the turn. At that point, he could not see what was around the corner to his left on Washington Street, where Marie Evans was innocently attempting to cross the street.

Eyewitnesses Calvin Webb and Gary Rascoe estimated that the vehicles were traveling as fast as 45 or 50 miles per hour when they entered Codman Square. As the Oldsmobile sped through the intersection, chased by the police vehicle, Marie Evans and her cousin Gary Rascoe were crossing Washington Street, on their way to a candy store on Talbot Avenue. As Marie put it in her testimony, she was simply "minding my own business," when she was hit by the car and "flew up in the air."

Petitioner's police practices expert, Lou Reiter, established that there are generally accepted national practices that apply to high speed pursuits. He testified that, in determining whether to conduct a pursuit, the officer should balance the law enforcement goals to be served by the pursuit against the risks to other people on the roadway.

Reiter testified that, in his opinion, the conduct of the

officers demonstrated "a reckless and callous disregard for the safety of persons in the community," and that this pursuit was "more likely than not to end up in a tragic accident." Reiter also testified that it was his opinion that "this wasn't a close call at all" and that "no reasonable officer" would have made the decision to pursue here.[3]

Reiter gave three reasons for his opinion. First, the officers' vehicle was not equipped for a pursuit, as recognized by the Police Department's own policy. Second, what the officers knew about the suspects did not justify the pursuit. Third, and of primary importance, the area was too dangerous. Reiter found the environmental factors in this neighborhood so "overwhelming" that conducting the pursuit was reckless and callous.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS REGARDING THE APPROPRIATE STANDARD FOR DETERMINING WHEN A HIGH SPEED POLICE PURSUIT VIOLATES THE SUBSTANTIVE DUE PROCESS RIGHTS OF A PERSON INJURED DURING THE PURSUIT.

All of the United States Courts of Appeals which have considered the issue have held that improper conduct of motor vehicle pursuits by police officers may, in some circumstances, violate an injured party's substantive due process rights.[4] *See,*

3. The fact that the pursuit lasted only a brief time before there was an accident did not alter Reiter's opinion that it should never have taken place. He noted that most pursuits, particularly in urban areas, are short. In a 1991 study in Los Angeles, 51% of the pursuits were less than 2 minutes in duration.

4. Petitioner made no argument that she was seized under the Fourth (Cont'd)

e.g., Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir., en banc, 1994); *Temkin v. Frederick County Com'rs.*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992); *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996); *Williams v. City and County of Denver*, 99 F.3d 1009 (10th Cir. 1996).

The lower federal courts have also established that contact with the police vehicle itself is not required, and that police officers may be liable for injuries caused when the victim is struck by the vehicle pursued. *Fagan v. City of Vineland, supra; Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992);[5] *Temkin v. Frederick County Com'rs., supra*; *Boyle v. City of Liberty, Mo.*, 833 F. Supp. 1436 (W.D. Mo. 1993).

(Cont'd)
Amendment, because under the decided cases it is clear that the police officers did not restrain her freedom of movement through means they intended to use for that purpose. *Brower v. County of Inyo*, 489 U.S. 593 (1989); *California v. Hodari D.*, 499 U.S. 621 (1991).

5. In *Medina*, the court held that the district court had erred in concluding as a matter of law that reckless conduct in a high speed pursuit was not directed at a bicycling bystander who was at a foreseeable risk, reasoning:

> We believe that reckless conduct can be considered directed toward the plaintiff if (1) the plaintiff is a member of a limited and specifically definable group; (2) the defendant's conduct specifically put the members of that group at substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; and (4) the defendant acted recklessly in conscious disregard of that risk. It is not, however, necessary that the defendant know the specific identity of each person within such a group

(Cont'd)

There is a sharp division among the circuits, however, as to the standard of proof required to prove a substantive due process violation. In the instant case, the First Circuit held that petitioner was obliged to prove that the officers' conduct was "shocking to the conscience" to establish a substantive due process violation. The court held that it would not be sufficient to prove that the officers were deliberately indifferent to the petitioner's rights. In so doing, the First Circuit departed from its earlier decisions which had held that a substantive due process violation could be established by evidence that the defendant official exhibited a reckless or callous indifference to the rights of the plaintiff.[6] The Third,[7] Fourth,[8] Fifth,[9] and Tenth Circuits[10] have also employed the shocks the conscience test for reviewing police pursuits.

The First Circuit's decision is in direct conflict with the

(Cont'd)

> in order for his conduct to be deemed directed toward the individuals within the group.

960 F.2d at 1496.

6. *Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990).

7. *Fagan v. City of Vineland, supra.*

8. *Temkin v. Frederick County Com'rs., supra.*

9. In *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986), the court employed the shocks the conscience test, but did not consider whether deliberate indifference or reckless disregard would have established a violation. The court rejected simple negligence as sufficient to state a constitutional claim.

10. *Williams v. Denver, supra.*

Ninth Circuit, which has held that a police pursuit will violate the substantive due process rights of an injured person where the officer's conduct is deliberately indifferent to or in reckless disregard of the person's right to life and personal security. *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996). The Ninth Circuit had earlier adopted this standard in a "state-created danger" case, where a nurse in a correctional institution sued her supervisors following injuries sustained during an attempted rape by inmates.[11] *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996).

Whether the appropriate standard for finding a substantive due process violation is the shocks the conscience test or the deliberate indifference or reckless disregard test has provoked considerable controversy and confusion among the lower federal courts. Although the Third Circuit's en banc opinion in *Fagan v. City of Vineland, supra*, is often cited as the leading authority for the shocks the conscience standard, its rationale has recently been questioned by the Third Circuit itself. The *Fagan* court had concluded that the shocks the conscience test was required by the decision of this Court in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992).[12] There was a powerful dissent by Judge Cowen, joined by three other Circuit Judges, rejecting the shocks the conscience test and concluding that reckless indifference in the conduct of a police pursuit should be sufficient to establish a § 1983 violation.

More recently, the Third Circuit has revisited the issues

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11. Many of the lower federal courts have recognized a cause of action where state actors have created a danger, as an exception to the general rule that the police have no constitutional duty to protect someone not in custody, established by this Court's decision in *DeShaney v. Winnebago County Dep't. of Social Services*, 489 U.S. 189 (1989).

12. Petitioner submits that *Collins* imposed no such requirement, as we discuss in the next section of this petition.

involved in substantive due process cases in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). This was a state-created danger case, in which an intoxicated woman suffered serious injuries when the police allowed her to walk home alone after her husband left her in the custody of the officers, assuming they were going to care for her. The court concluded that liability could be imposed for a violation of the plaintiff's constitutional rights where the officers had acted with reckless disregard for her safety. The court noted that the state-created danger theory had not been advanced or considered as an appropriate analysis in *Fagan* and concluded that its shocks the conscience standard was limited to police pursuit cases. This conclusion substantially undermines the vitality and the rationale of *Fagan*, where the Third Circuit had held that the shocks the conscience standard applied to all substantive due process claims of persons not in custody ("*Collins* leads us to conclude that the substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.' " 22 F.3d at 1303).

The law has also rapidly changed in the Tenth Circuit. The court had originally held in *Medina v. City & County of Denver*, 960 F.2d 1493 (10th Cir. 1992), that a high speed pursuit conducted with a reckless disregard for the safety of an identifiable group would violate substantive due process rights. More recently, however, that court has concluded that both reckless intent and conduct which shocks the conscience is required to establish the violation. *Williams v. Denver, supra.*

The standard of proof in other circuits is unclear. In the Sixth Circuit, in *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), the court found plaintiff's proof inadequate to meet the standard of gross negligence amounting to "outrageous conduct or arbitrary use of government power." In *Lewellen v. Metro.*

Govern. of Nashville, 34 F.3d 345, 351 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995), a substantive due process claim based upon the construction of a school under a high-voltage conductor line, the court concluded that under Collins, "[w]hat seems to be required is an intentional infliction of injury . . . or some other governmental action that is 'arbitrary in the constitutional sense.' " The court did not articulate the test in terms of conduct which shocks the conscience.[13]

The Seventh Circuit has not directly addressed the issue. In *Magdziak v. Byrd*, 96 F.3d 1045 (7th Cir. 1996), a police pursuit case, the court ruled against the plaintiff on qualified immunity grounds, holding that there could be no liability because previous cases with similar facts had not found liability against the officers. In *Hill v. Shobe*, 93 F.3d 418 (7th Cir. 1996), the plaintiff sued an officer who had run a red light, causing an accident. The court held that a constitutional violation would require "a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." *Id.* at 421. The court described the standard as one of criminal recklessness, and did not articulate the issue in terms of conduct which shocks the conscience.

In *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989), the Eighth Circuit held that there was no Fourth Amendment seizure in a high speed pursuit that ended in an

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13. In a case currently pending before this Court, *United States v. Lanier*, No. 95-1717, argued January 7, 1997, the Sixth Circuit concluded in a criminal case that shocks the conscience was too indefinite a standard for jurors to use, one which would require them to "make an essentially arbitrary judgment." *United States v. Lanier*, 73 F.3d 1380, 1389 (6th Cir.), *cert. granted*, 116 S. Ct. 2522 (1996). In *Mansfield Apartment Owners v. City of Mansfield*, 988 F.2d 1469, 1478 (6th Cir. 1993), the court questioned whether the shocks the conscience standard has any utility other than in assessing excessive force claims.

accident. The court concluded, however, that the plaintiff's claim, which was articulated as a complaint of excessive force, should be analyzed under Fourth Amendment protections against unreasonable seizures. The court asked whether the force used was reasonable, balancing the intrusion against the plaintiff's Fourth Amendment interests against the countervailing governmental interests.

The conflict between the First and the Ninth Circuits and the uncertainty regarding the law in many of the other Circuits demonstrate the need for a definitive resolution of these issues by this Court.

II. CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT FEDERAL CONSTITUTIONAL QUESTION OF WHAT CONSTITUTES THE APPROPRIATE STANDARD FOR DETERMINING WHEN A HIGH SPEED POLICE PURSUIT MAY VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF A PERSON INJURED DURING THE PURSUIT.

In *Daniels v. Williams*, 474 U.S. 327, 334 n. 3 (1986), this Court explicitly left open the question of whether a constitutional due process violation could be premised on something more than negligence, but less than intentional conduct, such as recklessness or gross negligence. The Court has as yet not resolved this question for substantive due process claims generally, or high speed police pursuits in particular.

In *Collins v. City of Harker Heights, Tex., supra*, this Court decided that a governmental employer's duty to provide its employees with a safe working environment is not a substantive component of the due process clause. The Court indicated its reluctance to expand the concept of substantive due process into new areas, and noted that the plaintiff's claim was

unprecedented. The Court concluded that the plaintiff's claim was analogous to a "fairly typical state law tort claim" and involved omissions by the city that could not "properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." 503 U.S. at 128.

The Court had no occasion in *Collins* to address the question of by what standard, had it recognized a potential substantive due process violation, the defendant's actions in a particular case should be judged. The Court did not establish that conduct that shocks the conscience is a necessary element of all substantive due process claims.

The careful and scholarly dissent by Judge Cowen in *Fagan* demonstrates the limited reach of *Collins*. As Judge Cowen points out, 22 F.3d at 1312, the Court in *Collins* used the phrase "shocks the conscience" only once, as a characterization of the plaintiff's contention, 503 U.S. at 126, and only once used the phrase "conscience-shocking." On that occasion, the phrase was not used exclusively, but in the disjunctive with "arbitrary." 503 U.S. at 128. Moreover, the predominant phrase used to assess the due process violation in the opinion is whether the city's action was "arbitrary." The Court stated that its "refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process . . . ," 503 U.S. at 128; and concluded that the petitioner "has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense"; and that "the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation." 503 U.S. at 129-130. The last substantive sentence of the opinion concludes that "the city's alleged failure to train or warn its sanitation department employees was not arbitrary in a constitutional sense." 503 U.S. at 130. No reference to the "shocks the conscience" test was

made in any of these portions of the opinion. If the language used by the Court could be read to establish implicitly the standard for proving a substantive due process violation, that standard would be arbitrariness.

Although the phrase "shocks the conscience" was used in *Rochin v. California*, 342 U.S. 165 (1952), there the Court at most stated that conduct that shocks the conscience would suffice to state a claim of constitutional deprivation, but did not hold that this was the proof required for a constitutional violation. The *Rochin* Court did not inquire into what would be the minimum requirement for establishing a substantive due process violation.

That *Collins* did not establish a single test for all substantive due process violations is clear from this Court's decision in *B.M.W. v. Gore*, 517 U.S. __, 116 S. Ct. 1589 (1996). The Court held that a punitive damages award which is "grossly excessive" in relation to the state's interests in punishment and deterrence enters the zone of arbitrariness that violates substantive due process. The Court made no mention of a "shocks the conscience" standard. In Justice Breyer's concurring opinion, he notes that the "constitutional concern . . . arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." 116 S. Ct. at 1605. This same concern is implicated in a high speed police pursuit conducted arbitrarily, or with reckless disregard for the safety of innocent civilians.

This Court has also avoided the amorphous language of the shocks the conscience standard in assessing alleged Eighth Amendment violations for the failure to protect convicted prisoners from harm. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court articulated the specific elements of such a claim. Liability may be found where a prison official actually "knows

that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." 511 U.S. at 847.

As this discussion demonstrates, the previous decisions of this Court do not provide a clear rule which governs substantive due process claims made as a result of high speed police pursuits. Given the important constitutional rights and law enforcement interests at stake, a resolution by this Court of this issue is required.

III. PETITIONER ADDUCED SUFFICIENT PROOF TO WARRANT SUBMITTING TO THE JURY THE QUESTION OF WHETHER RESPONDENTS HAD DEPRIVED HER OF LIBERTY IN VIOLATION OF HER SUBSTANTIVE DUE PROCESS RIGHTS.

As set forth in detail in the Statement of Facts, petitioner established that the conduct of the respondent police officers was, at a minimum, reckless and demonstrated deliberate indifference to her safety and liberty. The officers knew that they were chasing the suspect vehicle into an intersection likely to be crowded with children and other innocent pedestrians, bicyclists and occupants of vehicles. Indeed, they sped past several *"Drive Slow – Children"* signs as they approached the intersection. The officers knew that their visibility would be severely limited as they and the suspect entered the intersection, hence that their ability to avoid a collision would be extremely limited or non-existent. Yet, by their own admissions, the officers gave safety no thought as they commenced and continued their high speed pursuit, and gave no thought to discontinuing the pursuit once it had begun. They did not balance the risks to the community against what they hoped to gain from the pursuit, and hence proceeded with indifference to those risks. Petitioner's police practices expert Lou Reiter testified that the case did not

present a close call with respect to the officers' discretion, and that based on generally accepted law enforcement standards, their behavior demonstrated "a reckless and callous disregard for the safety of persons in the community."

These facts presented a legitimate jury question as to whether, at a minimum, the officers were reckless, or had demonstrated a deliberate indifference to the petitioner's rights and safety. The passing comment in dictum by the First Circuit, that the facts "add up to no more than possible negligence" (App. 13a), is neither controlling nor persuasive. Conducting the chase through an urban intersection the officers knew was likely to be populated, where they knew they had limited visibility, without taking the safety issues into account, would clearly satisfy the Tenth Circuit's definition that reckless conduct "is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." *Medina v. City and County of Denver,* 960 F.2d at 1496. Indeed, the proof here would satisfy the definition of recklessness provided by the Model Penal Code, § 2.02(2)(c), conscious disregard of "a substantial and unjustifiable risk."

This petition for certiorari presents an appropriate vehicle for this Court to consider the important constitutional question of what standard should govern substantive due process cases of this type, and to restore to petitioner her right to present to a jury her claim that respondents had violated her constitutional liberty interests.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED NOVEMBER 20, 1996

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-2125

MARIE EVANS, p.p.a., MURIEL EVANS,

Plaintiff, Appellant,

v.

TERRACE AVERY, ET AL.,

Defendants, Appellees.

No. 95-2126

MURIEL EVANS AND BILLY EVANS,

Plaintiffs, Appellees,

v.

CITY OF BOSTON,

Defendant, Appellant.

JUDGMENT

Entered: November 20, 1996

This cause came on to be heard on appeal from the United

Appendix A

States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed. All parties shall bear their own costs.**

By The Court

s/ William Ng
Clerk.

[cc: Messrs. Avery & McDermott]

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 20, 1996

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-2125

MARIE EVANS, p.p.a. MURIEL EVANS,

Plaintiff, Appellant,

v.

TERRACE AVERY, ET AL.,

Defendants, Appellees.

No. 95-2126

MURIEL EVANS AND BILLY EVANS,

Plaintiffs, Appellees,

v.

CITY OF BOSTON,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Appendix B

[Hon. William G. Young, *U.S. District Judge*]
[Hon. Robert B. Collings, *U.S. Magistrate Judge*]

Before

Selya, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Boyle,* *Senior District Judge*.

Michael Avery, with whom *Perkins, Smith & Cohen* was on brief, for plaintiffs.

Kevin S. McDermott, Assistant Corporation Counsel, with whom *Merita A. Hopkins*, Corporation Counsel, was on brief, for defendants.

November 20, 1996

SELYA, *Circuit Judge*. These appeals require us to revisit the legal standard which courts must apply to resolve a claim that a police pursuit has been conducted in a manner antithetical to the protections afforded by the substantive aspect of the Due Process Clause. The question arises in the context of a civil action brought against the City of Boston and two of its police officers after a motor vehicle driven by a suspected drug dealer fleeing from the police struck and injured a youthful pedestrian, Marie Evans. The district court took Evans' civil rights claims from the jury, and Evans now appeals both the court's direction of a verdict in favor of the police officers and its earlier grant of summary judgment in favor of the City. At the same time, the City cross-appeals from a jury verdict in favor of Evans' parents

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* Of the District of Rhode Island, sitting by designation.

on a related state-law tort claim. We affirm the judgment below in all respects.

I. BACKGROUND

We assess the facts of record in the light most favorable to the plaintiffs. *See, e.g., Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1375 (1st Cir. 1991) (elucidating standard of review for directed verdicts); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (same re summary judgments). No further elaboration of the facts is needed for disposition of the cross-appeal.

The events that fomented this lawsuit occurred in the twinkling of an eye. At approximately 6:00 p.m. on August 12, 1992, officers Terrace Avery and John J. Greene were cruising through a residential neighborhood in the Dorchester section of Boston. They spotted suspicious activity at the intersection of Nixon and Centre Streets: an individual who appeared to be startled at their presence yelled excitedly, threw a paper bag through the open window of a parked Oldsmobile, and vaulted into the front passenger seat. The driver immediately headed west on Centre St. at 20-25 m.p.h. Greene decided to stop the automobile and detain its occupants. He executed a U-turn, set out after the Oldsmobile, and activated his siren and wig-wag lights. Instead of stopping, the suspects' car accelerated. The officers took up the chase in earnest, travelling at roughly 45 m.p.h. When the officers observed the occupants of the Oldsmobile placing small items in their mouths and passing a jug back and forth, they concluded that the suspects were swallowing potential evidence.

As the Oldsmobile approached Codman Square — a

complex intersection at which Centre St., Washington St., Norfolk St., and Talbot Ave. meet — it crossed to the wrong side of the road, passed three cars waiting at a red light, and turned left on Washington St., travelling as fast as 50 m.p.h. The officers remained close behind. Approximately 300 feet from Codman Square, the suspects' vehicle struck a ten-year-old girl, Marie Evans, who was attempting to cross Washington St. Greene stopped his car and Avery alighted to assist the victim. Greene then continued his pursuit of the Oldsmobile. The entire incident lasted no more than two minutes.

The plaintiffs' evidence shows that traffic was heavy at the time of the chase and that numerous pedestrians were about. Both Greene and Avery were familiar with Codman Square and knew that it was a busy shopping venue adjacent to a densely populated residential area. They also knew that Centre St. affords limited visibility of the Codman Square intersection.

Marie Evans sued the officers pursuant to 42 U.S.C. § 1983 (1994); she sued the City pursuant to the same statute; and she and her parents, Muriel and Billy Evans, sued the City under Mass. Gen. L. ch. 258, § 2 (1988).[1] The district court

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1. The statute provides in relevant part:

> Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable . . . for punitive damages or for any amount in excess of

(Cont'd)

(Young, U.S.D.J.) granted summary judgment in favor of the City on Evans' section 1983 claim. Ruling *ore tenus*, the court determined that the plaintiff had failed to adduce evidence sufficient to prove a policy or custom of deliberate indifference attributable to the City. The parties thereafter consented to trial before a magistrate judge. *See* 28 U.S.C. § 636(c) (1994); Fed. R. Civ. P. 73(a). At the conclusion of the evidence, the court (Collings, U.S.M.J.) took the remaining section 1983 claim from the jury and granted the officers' motions for judgment as a matter of law. *See Evans v. Avery*, 897 F. Supp. 21 (D. Mass. 1995). The jury then considered the pendent claims and awarded damages to Evans and each of her parents in the amount of $100,000 (the per claimant maximum allowable under state law, *see supra* note 1). These appeals followed.

II. THE SECTION 1983 CLAIM AGAINST THE OFFICERS

Marie Evans asserts that the nisi prius court erred in directing a verdict for the police officers. She argues, in the alternative, that the court applied the wrong legal standard, and

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(Cont'd)

> one hundred thousand dollars. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee . . . whose negligent or wrongful act or omission gave rise to such claim, and no such public employee . . . shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; . . . .

Mass. Gen. L. ch. 258, § 2 (1988)

that, whatever legal standard obtains, the evidence established a jury question as to whether the officers, conduct violated her right to substantive due process.

Section 1983 supplies a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law. Evans' mishap involved neither physical contact with a police officer nor police action directed at her. In short, it was not a seizure and it was therefore not in derogation of her Fourth Amendment rights. *See Brower v. County of Inyo,* 489 U.S. 593, 596-97 (1989) (distinguishing between police action directed toward producing a particular result and police action that happens to cause an unintended, if foreseeable, result and holding that only the former can constitute a seizure); *Landol-Rivera v. Cruz Cosme,* 906 F.2d 791, 796 (1st Cir. 1990) ("It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim."). Nevertheless, even outside the context of a seizure, appellate courts have noted that a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983. *See, e.g., Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1408 n.10 (9th Cir. 1989), *cert. denied,* 494 U.S. 1016 (1990); *see also Landol-Rivera,* 906 F.2d at 796 (assuming proposition). The initial question that confronts us concerns the legal standard by which the officers' conduct should be judged in such instances.

We begin with an historical perspective. In *Landol-Rivera* we ruled that police officers who were engaged in hot pursuit of a suspect could not be held liable under the substantive aspect of the Due Process Clause for the shooting of a hostage. 906 F.2d at 798. We premised that ruling on a determination that the officers' conduct did not reflect a reckless or callous

indifference to the hostage's rights. *See id.* at 796-98. Two things about this articulation of the applicable legal standard are noteworthy. In the first place, our use of the "deliberate indifference" test did not broach new ground, but, rather, reflected a fairly straightforward application of our earlier holding in *Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989), in which we posited that reckless or callous indifference to an individual's rights is a necessary predicate to triggering the substantive protections of the Due Process Clause. *See id.* at 17-19 .[2] In the second place, *Landol-Rivera* did not presume to undertake a full formulation of the test applicable to substantive due process claims in creation of danger cases; instead, the court went only as far as was needed to show the infirmity of the particular claim before it.[3]

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2. Our decision in *Germany* responded to the Supreme Court's invitation in *Daniels v. Williams*, 474 U.S. 327 (1986). There, the Court held that mere negligence is insufficient to implicate the substantive protections of the Due Process Clause but left open the question of whether something less than intentional conduct might be enough to trigger those protections. *See id.* at 334 n.3.

3. In *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 582 (1st Cir. 1989), we upheld a section 1983 substantive due process claim under the "reckless or callous indifference" standard. There, four armed plainclothes police officers approached a car occupied by a young couple admiring the view at a secluded spot. When the swain saw the unidentified men, he started his car and began to drive away. Without warning, the officers opened fire and severely injured him. *See id.* at 557. Because the parties in *Gutierrez-Rodriguez* tried the case on the assumption that "reckless and callous indifference" constituted the rule of decision for section 1983 substantive due process claims — and argued in the same vein on appeal — we had no occasion to address whether anything beyond that standard might be required. In all events, the behavior exhibited by the police in *Gutierrez-Rodriguez* would shock even an unusually jaded conscience.

Appendix B

After this court decided *Landol-Rivera*, the Justices revisited the jurisprudence of substantive due process in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In that case, the widow of an asphyxiated sanitation department employee claimed that her deceased husband had "a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the [city's] custom and policy of deliberate indifference toward the safety of its employees." *Id.* at 117. Noting its traditional reluctance "to expand the concept of substantive due process," *id.* at 125, the Court recharacterized the plaintiff's "deliberate indifference" claim to include an additional element, namely, "that the city's 'deliberate indifference' to Collins' safety was arbitrary government action that . . . 'shock[s] the conscience' of federal judges." *Id.* at 126. The Court reiterated this standard when it determined that the city's alleged failure to train or warn its employees was not actionable as a substantive due process violation because the city's conduct could not "be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 128. Rather, the Court held petitioner's claim to be "analogous to a fairly typical state-law tort claim," and noted that it had "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Id.*

Since *Collins* was decided in 1992, two of our sister circuits, faced with the need to construct a template for substantive due process claims arising out of the state's creation of danger, have held squarely that the "shock the conscience" rubric furnishes the appropriate test. The Third Circuit, sitting en banc, adopted this standard in a police pursuit case. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1306-07 (3d Cir. 1994) (en banc) ("In light of the Supreme Court's unanimous adherence to the 'shocks

the conscience' test in *Collins*, the reckless indifference of government employees is an insufficient basis upon which to ground their liability for a police pursuit under the Due Process Clause."). In a different factual context, the Tenth Circuit relied on *Collins* for the proposition that the "shock the conscience" test governs substantive due process claims in all creation of danger cases. *See Uhlrig v. Harder*, 64 F.3d 567, 571 (10th Cir. 1995), *cert. denied* 116 S. Ct. 924 (1996). Moreover, at least two other courts of appeals, anticipating *Collins*, adopted the "shock the conscience" standard in police pursuit cases prior to 1992 (and still adhere to it). *See Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986). To be sure, the position taken by these courts is not uncontroversial. Judge Cowen wrote a vociferous dissent in *Fagan*, 22 F.3d at 1309, and the Ninth Circuit recently rejected the "shock the conscience" test, *Collins* notwithstanding. *See Lewis v. Sacramento County*, __ F.3d __, __ (9th Cir. 1996) [1996 WL 577835 at *5] (holding that deliberate indifference or reckless disregard "is the minimum required to sustain a § 1983 claim in the context of a high-speed police pursuit").

We are persuaded that the majority view of the minimum threshold in cases like this is correct.[4] Accordingly, we hold that police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct

4. We refuse to follow *Lewis* because we believe that the panel paid insufficient attention both to *Collins* and to the legitimate demands of law enforcement when it asserted, without engaging in any analysis, that "deliberate indifference is always sufficient" to maintain a section 1983 substantive due process action. *Lewis*, __ F.3d __ at [1996 WL 577835 at *5].

shocks the conscience. Though that benchmark is mandated for creation of danger cases under the fairest reading of *Collins*, we add that it is particularly appropriate to measure police pursuits in that way. Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

We think, moreover, that this standard is not inconsistent with, but is merely a refinement of, *Landol-Rivera*. As in *Landol-Rivera*, a plaintiff is still required to show the police officers' deliberate indifference to his rights. The plaintiff in *Landol-Rivera* could not clear this hurdle, so we had no occasion to explore whether any further hurdle blocked his path.[5] Today,

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5. Even if, as Evans urges, *Landol-Rivera* announced a broadly applicable rule to the effect that deliberate indifference is the be-all in creation of danger cases — a proposition that we do not accept — Evans would not be helped. While under ordinary circumstances we would be bound to follow a predecessor panel's lead, *see, e.g., Jusino v. Zayas*, 875 F.2d 986, 993 (1st Cir. 1989) (explaining that in a multi-panel circuit, newly constituted panels customarily are bound by prior panel decisions closely in point), there is a well-recognized exception to the rule for situations in which a panel opinion is undercut by controlling authority, subsequently announced. *See, e.g., Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995) (refusing to follow *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), in light of *Johnson v. Jones*, 115 S. Ct. 2151 (1995)); *United States v. Bucuvalas*, 909 F.2d 593, 594 (1st Cir. 1990) (overruling *United States v. Bosch Morales*, 677 F.2d 1 (1st Cir. 1982), in light of *United States v. Powell*, 469 U.S. 57 (1984)). If *Landol-Rivera* were to be read in the manner urged by Evans, the Supreme Court's subsequent decision in *Collins* would require us to invoke the exception here.

we move forward and hold that in order for a high-speed police pursuit to intrude upon substantive due process protections, the officers' conduct must not only manifest deliberate indifference to the plaintiffs rights, but must also shock the conscience.

Having clarified the applicable legal standard, we need not tarry. The evidence of record here, taken in the light most salutary to Evans' case, does not satisfy the "shock the conscience" test. The chase was brief in duration, lasting no more than two minutes. It covered about half a mile. The vehicles' speeds never exceeded 50 m.p.h. The officers had good cause to believe that the suspects were trafficking in cocaine. Though Evans is not bereft of talking points — the pursuit occurred in a densely populated residential area at a time when people would likely be ambling about, and the officers did not seriously consider alternatives to hot pursuit — these points, taken most favorably to Evans, add up to no more than possible negligence. Considering the totality of the circumstances, we do not believe that either the officers' decision to pursue the apparent perpetrators of a serious offense or their actions during the chase were so raw as to shock the conscience of a reasonable factfinder.

A comparison of the facts of this case to those of other police pursuit cases in which the officers' behavior has been held not to shock the conscience fortifies our conclusion. For example, *Fagan* involved a lengthy pursuit at speeds up to 80 m.p.h through a plethora of red lights. *See Fagan,* 22 F.3d at 1299-1300. Similarly, *Temkin*, 945 F.2d at 718, involved a police officer who pursued an individual suspected of stealing $17 worth of gasoline at speeds up to 105 m.p.h. on a narrow, two-lane highway, with the result that both the police cruiser and the pursued vehicle struck the plaintiff. The Fourth Circuit held that the officer's conduct, "while disturbing and lacking in

judgment," did not transgress the "shock the conscience" standard. *Id.* at 723. The actions of the officers in those cases were far more egregious than the actions of officers Avery and Greene. Although the "shock the conscience" test is not mathematically precise, the imprecision occurs at the edges — and this case, fairly viewed, does not present a close call.

To sum up, "shock the conscience" is the standard that guides our decision, and the conduct of officers Avery and Greene when measured against that benchmark is manifestly insufficient to support a substantive due process claim. We therefore reject Marie Evans' principal assignment of error.

III. THE SECTION 1983 CLAIM AGAINST THE CITY

Evans next argues that the district court erred in granting summary judgment on her section 1983 claim against the City of Boston. She asserts that the City exhibited deliberate indifference to individual rights both through its failure to monitor police pursuits and through its failure to supervise police officers involved in such pursuits. We need not probe Evans' charge that the City's policies were inadequate in these respects. As we explain below, the fact that Avery and Greene did not violate Evans' constitutional rights means that the City is not liable to her under section 1983.

This result is compelled by the Supreme Court's decision in *City of Los Angeles v. Heller,* 475 U.S. 796 (1986) (per curiam). In that case, the plaintiff sued a police officer for making an arrest with excessive force and without probable cause; he also sued the officer's employer, the City of Los Angeles, for promulgating a constitutionally deficient policy in regard to police officers' use of force. The jury found for the

officer but against the municipality. The district court entered judgment for the gendarme but overrode the second part of the jury's verdict and dismissed the claim against the city. The court of appeals reversed the order of dismissal but did not disturb the judgment that had been entered in the officer's favor. *See Heller v. Bushey,* 759 F.2d 1371, 1376 (9th Cir. 1985). The city then appealed. The Supreme Court reinstated the dismissal, declaring that it had never

> authorize[d] the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Heller, 475 U.S. at 799 (emphasis in original).

While *Heller* provides a durable basis for determining that a municipality cannot be liable under section 1983 for an inadequate public safety policy in a situation where, as here, the officers whose actions actually caused the harm have been exonerated at trial, we note that a panel of the Third Circuit found *Heller* inapplicable in a case much like this one. In *Fagan v. City of Vineland,* 22 F.3d 1283 (3d Cir. 1994) (panel opinion), the court stated that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the

Constitution." *Id.* at 1292.[6] The court reasoned that the claim against the officers and the claim against the municipality were based on two different theories: the officers would be liable if their conduct "shocked the conscience," while the city would be liable if its policymakers, acting with deliberate indifference, implemented a policy that encouraged the officers to conduct an unsafe pursuit. *Id.* Evans invites us to adopt this analysis. We decline the invitation because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings.

In *Collins*, the Court emphasized that

> proper analysis requires us to separate two different issues when a §1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.

Collins, 503 U.S. at 120. The *Fagan* panel described the "deliberate indifference" test as a "different theor[y]" for municipal liability, 22 F.3d at 1292, but the "deliberate indifference" test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the second prong of the *Collins* framework, adapted to "policy and custom" cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation. *See Thompson v. Boggs*, 33 F.3d 847, 859 n.11 (7th Cir. 1994) (rejecting the holding of the *Fagan* panel opinion), *cert. denied*,

6. When the Third Circuit subsequently reheard *Fagan* en banc, 22 F.3d 1296, it did not review this aspect of the panel opinion.

115 S. Ct. 1692 (1995); *see also Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 n.13 (3d Cir.) (questioning the analysis contained in the Fagan panel opinion), *cert. denied*, 116 S. Ct. 165 (1995). Consequently, we follow *Heller's* clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers. *See de Feliciano v. de Jesus*, 873 F.2d 447, 449 (1st Cir.), *cert. denied*, 493 U.S. 850 (1989).

IV. THE CROSS-APPEAL

The City of Boston appeals the jury's verdicts for loss of consortium in favor of Muriel and Billy Evans (Marie Evans' parents). It advances a single isthmian ground in support of its cross-appeal, arguing that the trial court erred in formulating a jury instruction.

We frame the assignment of error. Over the City's objection, the lower court instructed the jury that state law limited the damages that could be awarded on each claim to $100,000. *See supra* note 1. The City argues that this instruction was unfairly prejudicial inasmuch as it "caused the jury to decide the amount of damages on emotion." The City's premise is that, once the jury knew of the cap, it realized that it could not fully compensate Marie Evans for her extremely severe injuries and therefore decided to circumvent the statutory impediment by remunerating Marie's family as generously as possible.[7]

This asseveration lacks merit. Neither the Massachusetts

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7. Marie Evans presented testimony indicating that her damages may have totalled as much as $2,000,000. The jury, apparently heedful of the magistrate's instructions concerning the statutory cap, awarded her $100,000. The City has not appealed that verdict.

statute nor the cases discussing it prohibit such an instruction, and the City cites no case from any jurisdiction which holds that in such circumstances a trial court abuses its discretion by informing a jury of a statutory cap on damages.[8] To the contrary, the cases upon which the City relies stand for nothing more than the proposition that a trial court does not abuse its discretion in refusing to inform the jury of such a limit. *See, e.g., Thompson v. Sanford,* 663 S.W.2d 932, 935 (Ark. 1984); *State v. Bouras,* 423 N.E.2d 741, 744 (Ind. App. 1981).

The wisdom of telling a jury about such a statutory limitation is debatable, and we do not recommend the practice. Still, we customarily cede wide discretion to trial courts to fashion jury instructions as they see fit, *see United States v. Houlihan,* 92 F.3d 1271, 1299 n.31 (1st Cir. 1966); *Putnam Resources v. Pateman,* 958 F.2d 448, 462 (1st Cir. 1992), and we see no reason to second-guess the court in this instance.

This conclusion is reinforced by other incidents of the case at hand. For one thing, the awards to the parents are amply supported by evidence in the record — and almost none of this evidence has been contradicted. For another thing, after properly instructing the jurors on loss of consortium, the magistrate told them that "[t]he claims for Muriel and Billy Evans for loss of consortium are separate claims and each is to be judged separately." Jurors are presumed to follow the court's instructions, *see Houlihan,* 92 F.3d at 1287; *United States v.*

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8. This is not a case like *Sasaki v. Class*, 92 F.3d 232 (4th Cir. 1996), in which the trial court, though forbidden by statute from informing the jury of a cap on damages, nonetheless allowed counsel to do so. *See id.* at 235-37 (remanding for a new trial due to a violation of 42 U.S.C. § 1981a(c)(2)). Here, the Massachusetts legislature wrote a statute that is silent on this point, and we decline to speak for it.

Rivera-Gomez, 67 F.3d 993, 999 (1st Cir. 1995), and the City has not offered sufficient justification for overcoming this presumption. In the last analysis, the City's claim that the mere mention of the statutory cap inspired the jury to ignore the charge and instead do rough remedial justice is wholly speculative.

V. CONCLUSION

We need go no further. In a police pursuit case not involving a seizure, the officers may be held liable on the basis of substantive due process only if their actions (whether or not reckless or deliberately indifferent to public safety) shock the conscience. Here, Marie Evans' injuries are not the result of conscience-shocking conduct on the part of officers Avery or Greene. Section 1983 therefore provides no remedy against them (or against the City of Boston, for that matter).[9]

No error appearing, the judgment below will be

Affirmed. All parties shall bear their own costs.

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9. We emphasize that we are asked to determine as a matter of federal law only whether Marie Evans has a constitutional right to recover damages under the Due Process Clause. The questions of whether or to what extent she may maintain a suit under state tort law must be answered according to that body of law. The Commonwealth of Massachusetts has chosen to provide only a limited tort remedy, and, though that choice has a very harsh result here, we must recognize the state's suzerainty in its legitimate province. It is not the function of a federal court to force state tort law into unfamiliar contours under the guise of constitutional interpretation.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 5, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 94-10194-WGY
(COLLINGS, U.S.M.J.)

MARIE EVANS, ETC., MURIEL EVANS, BILLIE EVANS,

Plaintiffs,

v.

TERRACE AVERY, JOHN J. GREENE, CITY OF BOSTON,

Defendants.

JUDGMENT

COLLINGS, U.S.M.J.

The case came on before the Court for a trial by jury, the Honorable Robert B. Collings, United States Magistrate Judge presiding. The issues have been duly tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

Judgment for the plaintiff, Marie Evans, Etc., on Count III of the Amended Complaint in the amount of one hundred thousand dollars ($100,000.00).

Appendix C

Judgment for the plaintiff, Muriel Evans, on Count IV of the Amended Complaint in the amount of one hundred thousand dollars ($100,000.00).

Judgment for the plaintiff, Billy Evans, on Count IV of the Amended Complaint in the amount of one hundred thousand dollars ($100,000.00).

In accordance with Judge Young's ruling entered March 14, 1995, summary judgment for the defendant, City of Boston, on Count II of the Amended Complaint.

In accordance with the undersigned's allowance of the defendants' motion for judgment as a matter of law, judgment for the defendants, Terrace Avery and John J. Greene, on Count I of the Amended Complaint.

The plaintiffs shall recover their costs.

ROBERT J. SMITH, JR.
Clerk of Court

s/ Nancy Lee Irwin
Nancy Lee Irwin
Deputy Clerk

Dated at Boston, Massachusetts
this 5th day of September, 1995.

APPENDIX D — MEMORANDUM OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 5, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 94-10194-WGY

MARIE EVANS, ETC., MURIEL EVANS, BILLIE EVANS,

V.

TERRACE AVERY, JOHN J. GREENE, CITY OF BOSTON.

MEMORANDUM ON THE DEFENDANTS [sic] MOTION FOR A DIRECTED VERDICT (#83)

COLLINGS, U.S.M.J.

The within Memorandum is a brief explication[1] of the reasons why I granted Defendants [sic] Motion for A Directed Verdict (#83) on Count I of the Amended Complaint[2] before the case was submitted to the jury on August 8, 1995.[3]

Count I of the Amended Complaint sought to impose liability on the officers pursuant to 42 U.S.C. § 1983. In a nutshell, the

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1. My reasons were stated in open Court on August 7, 1995.

2. The motion should have designated a "motion for judgment as a matter of law" as per Rule 50(a), Fed.R.Civ.P.; I treated the instant motion as such.

3. The parties consented to have the case referred to me for all purposes, including jury trial and entry of judgment, pursuant to 28 U.S.C. § 636(c).

plaintiffs contended that the defendants Greene and Avery[4] deprived Marie Evans of her substantive due process rights by continuing to chase a vehicle whose occupants were suspected of drug violations down Center Street into Codman Square in Dorchester, Massachusetts where the pursued vehicle struck Marie Evans and injured her very seriously.

The first question is the standard by which the officers' conduct is judged. I agree with the Third Circuit's *en banc* decision in the case of *Fafan v. City of Vineland,* 22 F.3d 1296, 1303 (3 Cir., 1994) that under the Supreme Court's decision in *Collins v. City of Harker Heights, Texas,* 503 U.S. 11 (1992), the proper standard is whether the police officers' conduct "shocks the conscience."[5] The Fourth Circuit, in the case of *Temkin v. Frederick County Commissioners,* 945 F.2d 716 (4 Cir., 1991), *cent denied,* 502 U.S. 1095 (1992), issued a decision antedating the Supreme Court's decision in *Collins* in which the Court ruled that the "shocks the conscience" test was the standard

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4. Judge Young granted summary judgment to the City of Boston on the claim against it under 42 U.S.C. § 1983 as contained in Count II; the City was not named in Count I.

5. I note that the Sixth Circuit, albeit not in a case involving a police chase, has held that the *Collins* decision altered the standard by which the sufficiency of substantive due process claims is determined. *Lewellen v. Metropolitan Government of Nashville,* 34 F.2d 345, 349-351 (6 Cir., 1994). In the case of *Smith v. Lexington Fayette Urban County Government,* 884 F. Supp. 1086 (E.D. Ky., 1995), a case which *did* involve a police chase, the Court held that on the basis of the *Collins* case, as interpreted by the Sixth Circuit in the *Lewellen* case, "[to] establish a claim under section 1983 for a substantive due process violation *Collins* requires a plaintiff to show . . . conduct which "shocks the conscience," as seen in *Fagan v. City of Vineland, supra." Id.* at 1094.

applicable to alleged violations of substantive due process by police officers. *Id.* at 722. The petition for writ of certiorari filed by the plaintiffs in the *Temkin* case stated the first issue on which plaintiffs sought review to be:

> 1. Did the Court of Appeals for the Fourth Circuit err in adopting a standard of "shocks the conscience" for a substantive due process violation under 42 U.S.C. § 1983, when all other circuit courts have adopted standards ranging from gross negligence to "recklessness" to "deliberate indifference" or similar conduct?

What is interesting to note is that the Supreme Court denied the petition for a writ of certiorari in the *Temkin* case just two days before it issued its opinion in the *Collins* case.

Thus, I am of the opinion that, if faced with the issue today, the First Circuit would not adopt the standard of "callous or reckless indifference" to the rights of third parties which it applied before the *Collins* case was decided.[6] *See Germany v. Vance*, 868 F.2d 9, 17-18 (1 Cir., 1989). I find that the evidence at trial, taken in the light most favorable to the plaintiffs, is insufficient to establish that the conduct of Officers Greene and Avery was such as to "shock the conscience" as that phrase has been used in the cases.

If my opinion that the "shocks the conscience" standard is

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6. So far as I am aware, the First Circuit has not had occasion to consider the issue since the Supreme Court's decision in *Collins*.

the proper one is incorrect and the First Circuit does not follow the Third Circuit's decision in *Fagan v. City of Vineland, supra,* I find that the evidence at trial, taken in the light most favorable to the plaintiffs, is insufficient to establish that the conduct of Officers Greene and Avery was such as to constitute callous or reckless indifference to the rights of citizens such as plaintiff Marie Evans. I can find only two cases involving police chases in which courts have held or suggested that there was sufficient evidence that the officers' conduct amounted to callous or reckless indifference to an individual's rights in the circumstances in which the pursued vehicle caused the injury to the third person. These are *Fagan v. City of Vineland,* 22 F.3d at 1303 and *Medina v. City and County of Denver,* 960 F.2d 1493 (10 Cir., 1992). In each of these cases, the nature, extent and duration of the police conduct at issue was far more egregious than was established in the instant case. In cases in which the facts are more analogous to those in the instant case, courts have held that the evidence is insufficient to establish a substantive due process violation. *See, e.g., Dismukes v. Hackathorn,* 802 F.Supp. 1442, 1448 (N.D. Miss., 1992).

In the *Fagan* case, the police officer saw a Camaro proceeding on Vineland's main street at 1:55 A.M. with a passenger standing up through the car's open T-top roof waving his arms. The police officer attempted to stop the vehicle and give the driver a warning. The police chased the Camaro through various residential streets at speeds up to 40 miles per hour in a 25 miles per hour zone; the Camaro would slow at stop signs but not stop. At some point, the driver of the Camaro turned off his headlights. The Camaro got onto a four-lane road and at a speed of 50 miles per hour, passed a police officer who waved for the driver to stop and had blocked one of the lanes with his cruiser. The Camaro sped past another cruiser which had blocked

a cross street. The Camaro's speed increased to from 70 to 80 miles per hour. It ran a red light and hit Fagan's vehicle killing both occupants. *Fagan,* 22 F.3d at 1299-1300.

In the *Medina* case, the police chased a suspected felon at speeds of up to 60 miles per hour along a busy residential street during rush hour repeatedly running of stop signs. *Medina,* 960 F.2d at 3497. The officers conducting the chase disobeyed a direct order from their superior to discontinue the chase. The pursued vehicle collided with the plaintiff, Medina, who was riding on a bicycle, because two police cars who were approaching from opposite directions forced the driver of the pursued vehicle to turn directly into the bicycle at an intersection. *Id.* at 1494.

In the same vein, there are cases in which the police officer's conduct was found *not* to amount to callous and reckless indifference in which the nature, extent and duration of the police conduct at issue was far more egregious than was established in the instant case. For example in the case of *Jones v. Sherrill,* 827 F.2d 1102 (6 Cir., 1987), a police bulletin went out that a vehicle had been involved in an accident which involved property damages. Two police officers spotted the vehicle and observed that the driver was operating it in an unsafe manner. The vehicle fled despite the officers' attempt to stop it. During the pursuit, the officers drove at speeds of 120-135 miles per hour for nine miles within city limits. The pursued vehicle crossed the center of the road and collided head-on with Jones' vehicle, killing her. *Id.* at 1103-4. The Court of Appeals held that the evidence was insufficient to state a § 1983 claim under a substantive due process theory. *Id.* at 1106.

In sum, if I am incorrect in my view that the Supreme Court's

decision in *Collins* changed the standard by which the sufficiency of claims of violations of substantive due process is to be judged to "shocks the conscience," I would nonetheless grant the defendants Avery and Greene judgment as a matter of law on the § 1983 claim because, on the facts most favorable to the plaintiffs, their conduct did not reach the level of "callous or reckless indifference" to the rights of third parties as those terms have been applied in the circumstances of a police chase.

s/ Robert B. Collings
ROBERT B. COLLINGS
United States Magistrate Judge

September 5, 1992.

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED MARCH 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 94-10194-WGY

MARIE EVANS, by and through MURIEL EVANS, her mother and next friend,

Plaintiff,

v.

TERRENCE AVERY, JOHN J. GREENE, and CITY OF BOSTON,

Defendants.

MEMORANDUM AND ORDER

YOUNG, D.J. March 14, 1995

The plaintiff, Marie Evans ("Evans"), by and through Muriel Evans, her mother and next friend, brings this action pursuant to 42 U.S.C. § 1983 against the defendants, Police Officers Terrence Avery ("Avery" or "Officer Avery") and John J. Greene ("Greene" or "Officer Greene") and the City of Boston (the "City") for alleged violation of her Fourteenth Amendment rights. In addition, Evans brings a pendent state claim pursuant to the Massachusetts Tort Claims Act[1] against the City for the allegedly negligent actions of Officers Avery and Greene.

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1. Mass. Gen. Laws Ann. ch. 258, §1 et seq. (West 1988 & Supp. 1994).

Appendix E

The City here moves for summary judgment, arguing that Evans has not established a "policy" or "custom" on the part of the City making it responsible for the alleged injuries. The Officers also move for summary judgment, arguing that they are entitled to qualified immunity and therefore are not liable.

I. BACKGROUND

According to Evans,[2] on August 12, 1992, at approximately 6:00 p.m., she was struck by an Oldsmobile automobile on Washington Street in Codman Square in Dorchester, Massachusetts. Avery and Greene, in an unmarked police vehicle with police siren and emergency lights activated, had, less than a minute before, commenced pursuit of that Oldsmobile to conduct a threshold inquiry. The Oldsmobile allegedly struck Evans while Avery and Greene pursued it up Centre Street towards Codman Square.

There are conflicting allegations with regard to how the police vehicle entered the intersection where the accident occurred, and as to how many people were in the area at the time. According to Evans' witnesses, both vehicles came into the intersection travelling at between 35 and 50 miles per hour. The Officers' vehicle did not stop at the corner of Centre and Washington Streets. Evans' witnesses assert that there were a substantial number of people in the vicinity of the accident.

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2. In determining whether summary judgment is appropriate, the Court must view the record in the light most favorable to the non-moving party. *Mottolo v. Fireman's Fund Ins. Co.*, 43 F.3d 723, 725 (1st Cir. 1995).

Appendix E

II. DISCUSSION

A. The City

It is well established that municipalities can only be held liable under 42 U.S.C. § 1983 for civil rights violations committed by their employees if the injury was inflicted as a result of an official "policy" or "custom" of the city. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (holding that "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official[s] responsible for establishing final policy with respect to the subject matter in questions"); *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 694 (1978); *see also Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Bowen v. City of Manchester*, 966 F.2d 13, 18 (1st Cir. 1992) (municipalities cannot be held liable under section 1983 on a theory of respondent superior).

Evans alleges that her injuries were a direct result of the City's failure properly to supervise and discipline its police officers. Where the alleged "custom" or "policy" is a failure to act, the inaction must amount to "deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton. Ohio v. Harris*, 489 U.S. 378, 388 (1989). "Deliberate indifference" must result from conscious choice by the policy maker — "proof that the policymakers deliberately chose a training program which would prove inadequate. *Tuttle*, 471 U.S. at 823; *see also Cuddy v. City of Boston*, 765 F. Supp. 775, 777 (D. Mass. 1991) (Keeton, J.) (holding that the "deliberate indifference" standard adopted in *City of Canton*, which was a failure to train case, is equally applicable to cases where a municipality allegedly failed to discipline or supervise its employees).

Appendix E

Evans alleges the following: the City had a dangerously low number of street supervisors so that supervisors were unable to provide on-the-scene training and supervision; newly-appointed sergeants who served as street supervisors received only one day of supervisory skill training in their ten-day promotional training; and the City failed to employ a department-wide personnel performance evaluation system to assist in supervising police officers. Evans alleges that the inadequacies of the Boston Police procedures with regard to disciplining and supervising offending officers amounted to an operational policy of "deliberate indifference."

Evans has, however, failed to allege sufficient facts to prove that the City made a conscious choice to employ an "operational policy" or any policy which would provide in adequate supervision and discipline. Moreover, failure to discipline does not amount to the type of ratification from which a jury properly could infer municipal policy. *See Kibbe v. City of Springfield,* 777 F.2d 801, 809 n.7 (1st Cir. 1985).

Next, Evans alleges that the City failed properly to monitor and investigate motor vehicle pursuits by police officers. Evans asserts that: complaints by civilians of police officers tripled from 1981 to 1990; some complaints of misconduct were investigated by supervisors in the district who had daily contact with the accused officer, thus making it difficult properly to investigate complaints; officers investigating complaints routinely accepted reports which contained vague factual statements or conclusory claims that the police officer involved acted properly; no progress sheets or progress reports were prepared for internal investigations; no checklists of file contents or memoranda indicating investigative steps taken were prepared; and the internal affairs unit failed to contact non-police witnesses,

including civilian witnesses and complainants, as part of its investigation in most cases.

Even assuming the truth of these assertions, Evans cannot prevail as matter of law. Prior complaints of misconduct do not, standing alone, create an inference of a "policy" or "custom" of neglect. *See Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985) (prior complaints of police brutality insufficient to form a "pattern of police violence so striking as to allow an inference of supervisory encouragement, condonation, or even acquiescence"), *cert. denied sub nom. Town of Saugus v. Vontour,* 474 U.S. 1100 (1986). Moreover, failure adequately to investigate misconduct is insufficient to create municipal liability. *See Kibbe*, 777 F.2d at 809 & n.7 (sloppy post-shooting investigative procedures which could be said to have encouraged precipitous shooting did not create a sufficient ground for municipal liability).

Since Evans cannot hold the City liable for the actions of Officers Avery and Greene on account of poor supervision, discipline, or investigatory procedures, the City's motion for summary judgment on Count II must be, and hereby is, GRANTED.

B. Officers Avery and Green

The situation with respect to Officers Avery and Greene is far more complex and presents a very close question indeed. Generally, government officials performing discretionary functions are shielded from liability for damages under 42 U.S.C. § 1983 as long as their conduct does not violate clearly established statutory or constitutional rights known to a reasonable person in the officials' position. *See Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982); *see also Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (contours of the allegedly violated right must be sufficiently clear such that a reasonable official would understand that his or her conduct would violate that right). To determine whether an official is immune from liability for a civil rights violation, it is appropriate to (1) determine whether the conduct violated a clearly established constitutional right, and (2) analyze the objective reasonableness of the official's conduct. *Santiago v. Fenton*, 891 F.2d 373, 386 (1st Cir. 1989) (citing *Harlow,* 457 U.S. at 818). Government officials may be held liable for a substantive due process violation only if their conduct demonstrated a "reckless or callous indifference" to an individual's rights. *See Landol-Rivera v. Cruz Cosme,* 906 F.2d 791, 796 (1st Cir 1990); *Gutierrez-Rodriguez v. Cartagena,* 882 F.2d 553, 559 (1st Cir. 1989); *Germany v. Vance,* 868 F.2d 9, 18 (1st Cir. 1989).

As the First Circuit has recently explained:

> [T]he Supreme Court's standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present. In *Graham v. Connor,* 490 U.S. 386 (1989), the Court said that the "calculus of reasonableness" must make "allowance" for the need of police officers "to make splitsecond judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation."

Also pertinent is the Court's more general

> statement in *Anderson v. Creighton* addressed to qualified immunity for a Fourth Amendment violation. The Court used as its standard the "reasonable officer" and what "could reasonably have been thought lawful" by such an officer, terms suggesting a measure of deference. The Court then quoted earlier decisions saying that immunity protects "all but the plainly incompetent or those who knowingly violate the law" or those who act where "the law clearly proscribed the actions" taken.
>
> What these precedents dictate is this: whether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently.

Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994) (citations and footnote omitted); *see also Mally v. Briggs*, 475 U.S. 335, 343 (1986) (qualified immunity leaves "ample room for mistaken judgments").

Appendix E

Here, Evans asserts that the Officers did not stop before entering Codman Square, but came barrelling onto Washington Street immediately behind the suspects' Oldsmobile. Moreover, according to Evans' evidence, Codman Square was then occupied by a "substantial" number of pedestrians, bicyclists, and motor vehicles innocently going about their business. Based upon these facts, Evans argues that the Officers' failure to weigh the risks associated with a motor vehicle pursuit versus the need involved in the immediate apprehension of the suspects amounted to a callous and reckless indifference to the civil rights of Marie Evans.

Assuming the facts in favor of Evans, the Officers' conduct is evidence of negligence; negligence alone, however, is insufficient to establish a due process violation. *Landol-Rivera*, 906 F.2d at 797 (citing *Daniels v. Williams*, 474 U.S. 327 [1986]).

The distinction between "negligence" and "intentional" conduct or conduct evidencing "reckless or callous indifference" involves the actor's degree of certainty that harmful consequences will result from his or her act or omission. In this case, if the Officers desired to cause Evans' injury or acted with the belief that the harm was certain to result, they acted "intentionally." If the Officers had no such desire or belief, but acted unreasonably in light of the risks, their behavior was "negligent." "Reckless or callous indifference" is a lesser form of intent, not a heightened degree of negligence. The Officers acted with reckless or callous indifference in this case if they believed or reasonably should have believed that their conduct was very likely (but not certain) to result in Evans' injury. *See Germany*, 868 F.2d at 18 n.10.

In this case, Evans argues that it is doubtful that the Officers

had reasonable suspicion to conduct a threshold inquiry of the suspects and that, even if they did, the Officers' conduct was not objectively reasonable as the purpose of the pursuit was only to conduct a threshold inquiry.

Here, the Officers had probable cause to believe that the suspects were drug dealers, based in large part on the suspects' flight after a police order to stop and an apparent drug ingestion (which detectives knew was a favored means of drug disposal used by drug sellers in the area). The Officers thus had probable cause to pursue the suspects for drug violations. *See Commonwealth v. Holmes*, 34 Mass. App. Ct. 916, 917-918 (1993) (defendant's subsequent flight coupled with officer's observation of odd bulge in defendant's pocket suggesting a concealed weapon, provided independent justification of officer's pursuit and post-arrest pat-down search); *see also Commonwealth v. Sanchez*, 403 Mass. 640, 646 (1988) (suspect's flight may be considered as a factor in evaluating the officer's articulable suspicion because the "suspect broke away from the police before they pursued him"); *Commonwealth v. Marrero*, 33 Mass. App. Ct. 440, 444 (1992).

Even though the Officers had probable cause lawfully to initiate pursuit of the suspects, it remains to be considered whether the Officers — in the particular circumstances of this case — displayed reckless or callous indifference to the rights of others by initiating the chase at the time and place and in the circumstances they did.

Enforcement of the law all too frequently places police officers at risk and sometimes involves risk to the general public as well. Motor vehicle pursuit of suspects by police *always* places the public at some risk, but the mere presence of these risks

does not represent a callous indifference to those individuals potentially harmed. *See Landol-Rivera*, 906 F.2d at 797. Police officers are empowered to take apparent offenders into custody — and to chase them down if they flee — due to a larger concern with the harm such offenders may inflict on society if not brought to book. Police officers are nevertheless liable for callous or reckless indifference to the constitutional rights of third parties while pursuing a motor vehicle. Most police chase cases finding liability, however, present circumstances fat different from the undisputed facts here.

In *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), a jury found police officers liable under section 1983 for the death of a suspect, not an innocent third party, who was fatally shot during a motor vehicle pursuit. The pursuit involved at least ten officers and three separate shooting incidents, in which three different officers fired their weapons. Similarly, in *Boyle v. City of Liberty*, 833 F. Supp. 1436, 1443 (W.D. Mo. 1993), the court held that the plaintiffs alleged sufficient facts to bring the case within the "arrogant disregard exception to official immunity doctrine" where the plaintiff claimed: heavy traffic; erratic behavior throughout the twenty-two mile pursuit; the speed of the chase exceeded 100 miles per hour; and the occurrence of a separate accident during the high speed chase prior to the accident at issue.

Theoretically, of course, at some level of crowding and innocent use of the public ways by third parties, the police decision to initiate a motor vehicle chase could be said to evidence callous indifference to or reckless disregard of bystanders' civil rights which strips away qualified immunity. Here, however, the summary judgment record is woefully inadequate. Little or nothing is known about the conditions at

the point where the chase was initiated, *viz.* how many people were abroad and visible at that point?

The record here provides only the sketchiest of information about the road network in this portion of the city, the number of travel lanes, the gradient, the parking patterns, the traffic control signals, the pedestrian traffic within crosswalks and otherwise (both at the point of origin of the chase and at the scene of the accident), expected routes of flight, the position of the suspect car when first spotted, and the likelihood that the police car could have maneuvered so as to prevent flight.[3]

So, what to do? There is an inclination to grant summary judgment for the individual police officers. After all, the burden is on Evans to make out her *prima facie* case in order to ward off summary judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). But then, all reasonable inferences must here be drawn in favor of Evans, *id.* at 330 n.2 (Brennan, J., dissenting), and the reference to the presence of a "substantial" number of pedestrians may mean a thoroughfare so obviously clogged and crowded with innocent people that it was clearly reckless to commence a chase in such circumstances.

Accordingly, the Court adopts the following course. The motion of the individual police officers for summary judgment is denied without prejudice to its renewal. This gives the defendant police officers two choices:

They may renew their motion for summary judgment. If they do so, Evans must submit additional affidavits and evidentiary material addressing the questions posed above and

3. This list is not exhaustive, simply details which occur to me as I write. The point remains: the present record is woefully inadequate.

quantifying the number of pedestrians in the public ways both at the origin of the chase and at the point of the accident. Without such evidence, the Court must conclude that she has nothing better to offer, and is likely to grant summary judgment for the police officers.

Alternatively, the police officers, having asserted their qualified immunity on the present record and having been turned down, may appeal. *See Fonte v. Collins*, 898 F.2d 284, 285 (1st Cir. 1990); *see also Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of qualified immunity "an appealable 'final decision' within the meaning of 28 U.S.C. § 291 notwithstanding the absence of a final judment").[4] They may, for instance, choose this course if they think the present record requires as matter of law a judgment in their favor. If the police officers appeal, that interlocutory step ousts this Court of jurisdiction over that part of the case. *United States v. Mala*, 7 F.3d 1058, 1060-61 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1839 (1994). In this posture, the ends of justice justify promptly entering final judgment on behalf of the City pursuant to Fed. R. Civ. P. P. 54(b) so that

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4. The Court recognizes that the appealability of an order denying qualified immunity with leave to reassert it is open to question as lacking the requisite degree of finality. This Court considers it an appropriate option, however, since the present ruling exposes the officers, at a minimum, to markedly greater transaction costs even if they ultimately prevail — a burden the doctrine of qualified immunity seeks to prevent or minimize. *See Anderson v. Creighton*, 485 U.S. 635, 638 (1987) (recognizing that qualified immunity shields officials from social and monetary costs of litigation that would otherwise inhibit them from the proper discharge of their duties); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (actions against officials risk costs "not only to the defendant officials, but to society as a whole"). After all, the present situation is not different from that which obtains when a court denies an assertion of qualified immunity at the summary judgment stage only to reconsider the issue at the final pre-trial conference.

Evans may, if she wishes, appeal this Court's ruling at the same time as she grapples with the police officers' appeal. Surely one interlocutory appeal is better than two, especially when that one bids fair either to bring the litigation to an end or set it on its proper course.

SO ORDERED.

s/ William G. Young
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.